Supreme Court, U.S.
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No. 02-1585

IN THE

Supreme Court of the United States

BAYSTATE TECHNOLOGIES, INC.,
Petitioner,

v.

HAROLD L. BOWERS
(doing business as HLB Technology),
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

There are no parent corporations of Respondent and there are no publicly held companies that own 10% or more of the stock in Respondent.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

Pursuant to Supreme Ct. Rule 24(2), Respondent identifies the following additional statutory provisions that are pertinent to this case, but which were omitted from the Petition (the full text of these sections appears in the attached appendix, at pages 1a-3a):

1) 17 U.S.C. Chapter 13, - Protection of Original Designs.

2) 17 U.S.C. §906, entitled "Limitation on exclusive rights: reverse engineering; first sale," and in particular subsection (a) of that section.

3) 17 U.S.C. §1201, entitled "Circumvention of copyright protection systems," and in particular subsection (f) of that section.

SUPPLEMENTAL BRIEF IN OPPOSITION

Two weeks after Bowers filed its brief, the Institute of Electrical and Electronic Engineers et. al. (hereinafter "IEEE") filed an Amicus Brief raising new issues.[1] The IEEE represents to this court that "*Bowers* has shocked the computer software industry" and that there is a "widely held belief" that contractual "restrictions on reverse engineering" are "preempted under federal law." Amicus Brief at 6-7. These representations are belied by the fact that the IEEE has engaged in a five year lobbying effort to convince Congress and the States (via the Uniform Computer and Information Transaction Act (UCITA)) to limit the ability of private parties to agree to contractual restrictions on reverse engineering.[2] Other then two narrow exceptions (17 U.S.C. §906 and 17 U.S.C. §1201) enacted by Congress, these efforts have been universally rejected. UCITA makes no mention of reverse engineering in its text. The IEEE's lobbying efforts resulted in a single comment referring to the

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[1] The IEEE annually cosponsors a "Working Conference on Reverse Engineering" teaching electronics and electrical engineers how to reverse engineer other companies products.

[2] See, for example:
http://www.ieeeusa.org/forum/POLICY/1998/98oct09.html
(1998 IEEE UCITA position letter advocating allowing reverse engineering to the extent it is necessary to achieve interoperability, a position much narrower than that advocated to this Court). See also:
http://www.ieeeusa.org/forum/POLICY/1998/98jun05.html (1998 IEEE letter to Congress advocating reverse engineering for interoperability).

policy rational behind the very narrow prohibitions expressed by Congress in 17 U.S.C. §1201. Having failed to persuade Congress or the States to enact legislation to its liking, the IEEE now asks this Court to judicially legislate even more sweeping changes than those that were previously rejected by both Congress and the States.

The IEEE relies heavily on this Court's policy decision in *Bonito Boats*. The IEEE fails to inform the Court that Congress subsequently enacted 17 U.S.C. Chapter 13 to restore the "plug molding" protections previously offered by the States.

The IEEE claims that the existing respect for private contract hurts small business and helps entrenched interests. It is significant that Mr. Bowers is a small business. His very ability to survive was premised on protecting his innovations against imitators such as Baystate, and he relied on his contract rights for this protection. Once his much larger competitor, Baystate, copied his products and gave them away for free, his contract provided a remedy.

There is no uncertainty or imbalance in the law. Contrary to the representations of the IEEE, private contract law is stable and well developed in all 50 States. No less than five federal appellate courts have found shrinkwrap contracts between private parties to be enforceable.[3] None

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[3] Baystates new theory of "copyright misuse" was waived below and should not be considered for the first time on appeal.

have held to the contrary.[4] This case has already been pending for twelve years. To the extent that any balancing remains to be done between the various interests, whether it be libraries, electrical engineers, imitators, content providers or innovators, this balancing is best left to Congress.

Respectfully submitted,

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[4] The IEEE urges this Court not to be distracted by "the question of whether actual conflict exists between *Vault* and *Bowers*. Amicus Brief at 9.